

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

June 12, 1998

UNITED STATES OF AMERICA)	
Complainant,)	8 U.S.C. 1324c Proceeding
)	OCAHO Case No. 98C00064
v.)	
)	
MARCOS INIGUEZ-CASILLAS)	
Respondent.)	
_____)	

ORDER OF INQUIRY

INTRODUCTION AND PROCEDURAL HISTORY

On April 6, 1998, the United States Immigration and Naturalization Service (INS) filed a complaint alleging that Marcos INIGUEZ-Casillas, a citizen and national of Mexico, violated the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324c by possessing and using a fraudulent alien registration card (green card) number A 52 084 141 and a fraudulent social security card number 526 56 4131 after November 29, 1990 to satisfy a requirement of the Act. Accompanying the complaint were Exhibit A, a Notice of Intent to Fine encompassing the same allegations and Exhibit B, respondent's timely request for hearing.

On May 6, 1998, Iniguez-Casillas responded to the complaint by a letter stating as follows:

This is to inform you that I have agreed to the terms specified on the last form that I was sent dated April 7, 1998. Which is to pay a civil money penalty of \$500.00 dollars.

I went to court back on May 10, 1995 and was granted pardon. I realize the mistake I made and I am willing to pay the amount that has been specified.

I would appreciate your attention to this matter. And I would appreciate any information that could be sent to me regarding my status here in the United States of America. Enclosed you will find a self addressed envelope that would help for any information that you could send me.

In the past I have submitted all information that has been requested to me, but all I have received is permits in the past 3 years to work.

It is unclear from this response what proceeding took place in what court on May 10, 1995, or what Iniguez-Casillas' current status in the United States is.

On June 2, 1998 the parties filed a document captioned "Withdrawal of Hearing Request and Joint Motion to Dismiss Complaint and Terminate Proceedings Before ALJ" accompanied by a photocopy of respondent's check for \$500 and a settlement agreement setting forth the agreements of the parties. That agreement recites that it contains the entire understanding of the parties and supersedes any prior agreements, that there have been no other representations, express or implied, and that respondent admits the allegations and agrees to pay \$500. It states further that:

Any request for a hearing filed by the Respondent pursuant to § 274C(d)(2) of the Act, 8 U.S.C. § 1324c(d)(2) and 8 C.F.R. § 270.2(f) is hereby withdrawn;

The INS will issue a Final Order (Form I-764C) in this Action, in conformity with Paragraph 2 of this Agreement, which is a final and unappealable order pursuant to 8 C.F.R. § 270.2(g);

That the Final Order shall have the same force and effect as an Order made after a full hearing;

That nothing in this Agreement shall be construed as relieving the Respondent of liability or penalties for any violations of § 274C of the Act, 8 U.S.C. § 1324c, other than those violations set forth in the Complaint.

DISCUSSION

OCAHO rules¹ provide in pertinent part:

Where the parties or their authorized representatives or their counsel have entered into a proposed settlement agreement, they shall:

...

Notify the Administrative Law Judge that the parties have reached a full settlement and have agreed to dismissal of the action.

Dismissal of the action shall be subject to the approval of the Administrative Law Judge.

28 C.F.R. § 68.14(a) (1997) (emphasis added).

¹ Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1997).

This order of inquiry is made because I find it inappropriate to approve the settlement agreement without a showing either that Iniguez-Casillas has received constitutionally adequate notice of the immigration consequences of a final order pursuant to 8 U.S.C. § 1324c or that the “pardon” he refers to is a discretionary waiver of deportation pursuant to § 345 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, 3638 (September 30, 1996) (codified at 8 U.S.C. § 1251(a)(3)(C)(ii)).

On May 18, 1998, the Ninth Circuit affirmed as modified the determination of the District Court for the Western District of Washington that the nationwide procedures by which INS customarily obtained waivers of aliens’ rights to a hearing in document fraud cases violated the aliens’ rights to due process of law. Walters v. Reno, ___ F.3d ___, 1998 WL 257263, at *2 (9th Cir. 1998). Among the reasons cited was the fact that the INS’ waiver of rights form failed adequately to inform the aliens of the true immigration consequences of the waiver:

Such an order renders an alien deportable and permanently excludable. Deportation is automatic, except in narrowly limited circumstances. If the alien signs a statement waiving his rights with respect to the document fraud charges, including his right to a hearing, the INS will immediately issue an unappealable final order assessing a fine and requiring the alien to cease and desist from his wrongful conduct, but the ultimate result that ordinarily will follow soon thereafter will be the issuance of an order of deportation.

Walters, at *1.

The class which the district court had certified included:

All non-citizens who have or will become subject to a final order under § 274C of the Immigration and Nationality Act because they received notice forms that did not adequately advise them of their rights, of the consequences of waiving their rights or of the consequences of failing to request a hearing.

Walters, at *2 (emphasis added).

Iniguez-Casillas did, of course, request a hearing so he is not precisely in the same procedural posture as were the plaintiffs in Walters. That, however, is a distinction without a difference in that he appears to have signed a withdrawal of his request for hearing which for all intents and purposes suffers from the same defects as the notice form which the court in Walters found to be constitutionally defective.

Waiver has been described as the voluntary relinquishment of a known right. Walters, at *21 n.2 (“A waiver of . . . these basic rights is valid only if the government demonstrates that the alien intentionally relinquished a known right or privilege.”) citing United States v. Lopez-Vasquez, 1

F.3d 751, 754 (9th Cir. 1993), and Davies v. Grossmont Union High Sch. Dist., 930 F.2d 1390, 1394 (9th Cir. 1991). Before I approve the proposed settlement it is therefore necessary to ensure that Iniguez-Casillas' waiver of his right to a hearing is both voluntary and knowing.

INQUIRY

Each of the parties is therefore requested on or before July 15, 1998 to describe from its point of view the circumstances under which the settlement agreement was entered. The description should provide sufficient detail to permit a determination as to whether Iniguez-Casillas' waiver of his right to a hearing is voluntary and knowing. The requisite showing may be satisfied in a variety of ways, including:

- 1) a showing that Iniguez-Casillas has received a notice which conforms with the requirements set out in Walters; or
- 2) a showing that the "pardon" granted on May 10, 1995 relieved Iniguez-Casillas from the consequences of the 274C finding; or
- 3) a showing that the totality of the circumstances demonstrates both voluntariness and knowledge. Those circumstances might include such factors as:
 - a) whether there was any consideration for the withdrawal of the request for hearing,
 - b) whether respondent consulted an attorney before executing the withdrawal,
 - c) the period of time respondent was given to consider the INS proposal,
 - d) what explanations were provided about the consequences of the withdrawal,
 - e) whether the explanation was oral or written,
 - f) whether the language used was English or Spanish,
 - g) whether respondent is fluent in English, and
 - h) any other facts and circumstances bearing on the issues of voluntariness and knowledge.

SO ORDERED.

Dated and entered this 12th day of June, 1998.

Ellen K. Thomas
Administrative Law Judge